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Br. of Hodges for P. G.
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Supreme Court
OF THE
United States
OF AMERICA.

OCTOBER TERM, 1901.

Term No. 572.

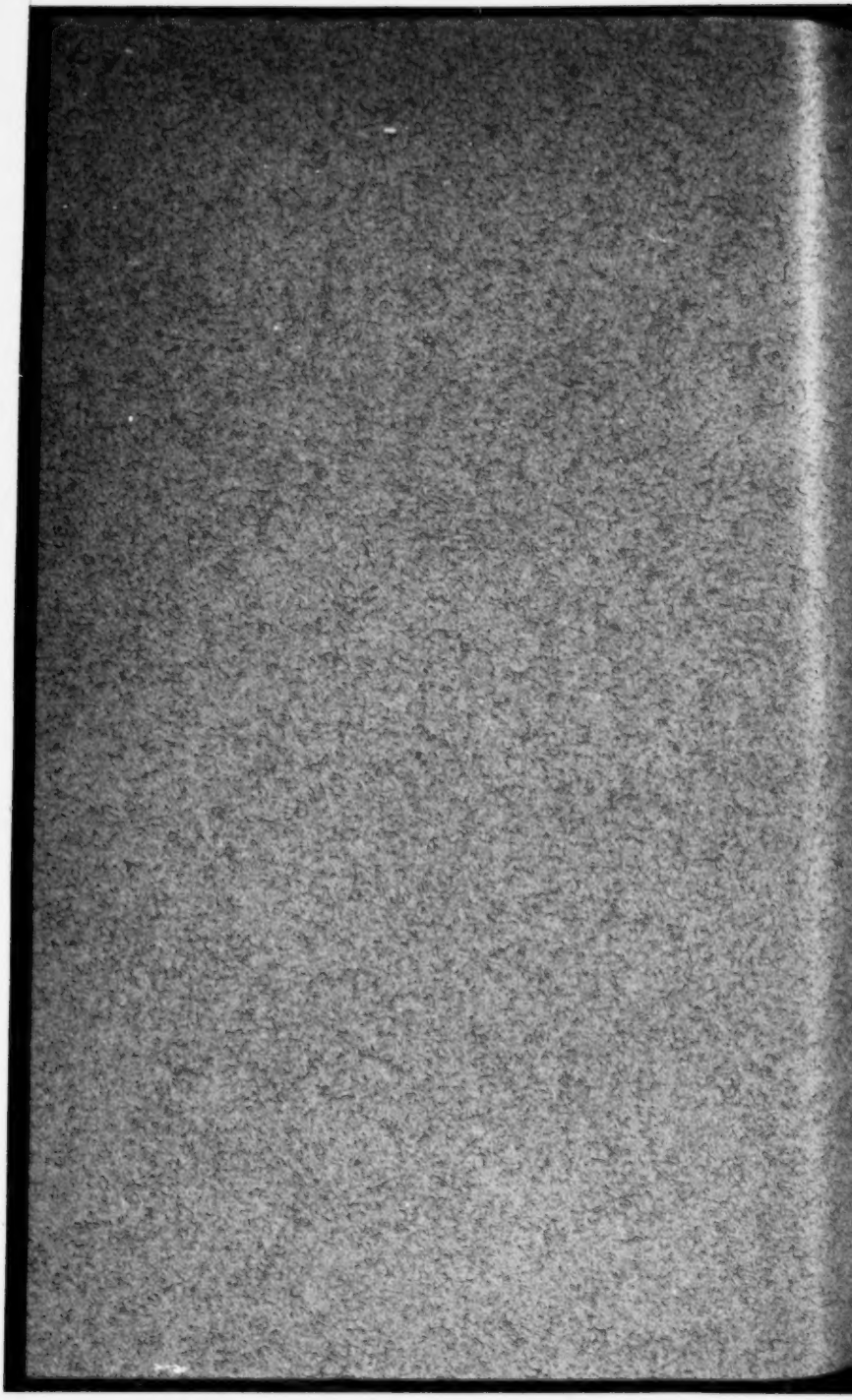
Solomon Hotema, Plaintiff In Error,

VS.

The United States.

BRIEF OF

JACOB C. HODGES.
Attorney for Plaintiff in Error.



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OCTOBER TERM, 1901.

Term No. 572.

Solomon Hotema, Plaintiff In Error,

VS.

The United States.

In error to the District court of the United States for the Eastern District of Texas.

Statement of Case:

The Grand Jury for the Central District United States court for the Indian Territory holding session at Antlers, I. T., on April 4th, 1900, returned in the

said court the indictment in this case charging plaintiff in error with the murder of Vina Coleman. On motion of the plaintiff in error the venue was changed to the United States District, Eastern District, at Paris, Texas.

At a regular term of said court at Paris, Texas, on the 20th day of November, 1901, the government announced ready for trial, plaintiff in error presented special plea as shown in his assignment of errors herein after stated, said plea was overruled and plaintiff forced to trial on the general issue, whereupon plaintiff in error by his counsel, said not guilty, and stated while he did not deny the killing, he, plaintiff was insane at the time of the homicide, and therefore not amenable to the law for the offence of murder charged in the indictment.

After all the evidence had been offered counsel for plaintiff in error, moved the court to allow plaintiff in error to open and conclude the argument as shown by the Bill of exceptions, page 116 record, which was overruled, and counsel for the government allowed to open and conclude the argument to which plaintiff in error resumed exceptions, record page 16.

Plaintiff in error excepted to the charge of the court as shown in bill of exceptions record pages 16 to 20 inclusive. Verdict of guilty of murder fixing the death penalty was returned. Motion for new trial

overruled, plaintiff in error perfected this appeal. and now prays this court to reverse and remand the case for errors assigned and shown in the records as follows:

1st. Assignment.

"The court erred in sustaining the demurer to defendants plea of former jeopardy; said plea if true was a bar to the prossecution; the plea alleged that defendant had been tried before a jury in the United States court at Paris, Texas, upon the same issue joined in this case. Hence error to sustain a demurer." The assignment is a proposition its self. The plea was sufficient to allow plaintiff in error to have a finding by the jury upon the facts alleged in the plea.

AUTHORITIES:

Ball vs. United States 158. 163

U. S. Supreme court report and authorities there cited.

2nd. Assignment.

"The court erred in refusing to allow Dr. Moody and others to give their opinions as to what produced the mental condition of the defendant at the time of the homicide i. e. that his deranged and insane condition was in the opinion caused from physical condition and not from reading the Bible or traditional teachings and heredity. Proposition: when any issue is fairly raised on the trial of a case evidence should

always be admitted to prove or disprove the issue. the court in its charge made the causes that produced the deranged and insane condition of the defendant an issue and made his guilt or innocence depend upon the causes which produced the insanity. see courts charge 12 paragraph record page 34.

3rd Assignment.

"The court erred in refusing the defendant's counsel the right to open and conclude the argument. The defendant in his plea admitted the killing of the alleged deceased at the time and place charged in the indictment, and assumes the burden of showing that he was insane at the time of the killing. The sanity of the defendant at the time of the killing was the only issue for the jury to pass on, and the only one submitted to them in the court's charge, hence error to refuse the defendant the right to open and conclude the argument of the case.

Our contention is that the record page 15 shows that plaintiff in error before any evidence was offered admited as a part of his plea that he did the killing at the time and place alleged in the indictment and as a defense assumed the burden of showing that at the time of the homicide he was insane The government did not offer any evidence to prove or disprove the issuejoined until the plaintif in error had offered all of his evidence to prove the truth of his affirma-

tive plea, insanity; therefore counsel should have been allowed to open and conclude the argument. And the action of the court in denying this right to plaintiff in error was certainly prejudicial to plaintiffs in error.

4th. Assignment.

The court erred in using the following language: "The most usual illustration and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he appears he is slain, or preparation and administering poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be a killing upon express malice." Error because there was no evidence before the court as to lying in wait, or preparing or administering poison. Said charge is not correct definition of express malice. This assignment presents the question upon the theory that all charges should be applicable to the facts in evidence.

5th Assignment.

The court erred in using the following language in his charge: "In this case it is immaterial so far as the question of guilt or innocence that the evidence fails to show any motive for the killing. Error because want of motive for the killing was material, and the jury should have considered the fact that the evi-

dence wholly failed to show any motive on the part of the defendant for the killing. Defendant's bill of exceptions shows undisputed that the defendant was a relative and warm friend of the deceased for many years up to and including the time of the killing; these facts should have been considered by the jury. The want of motive was a material inquiry for the jury to consider in determining whether defendant acted from an insane delusion in killing deceased or from some motive which might constitute his act a crime. Hence error to tell the jury that the admitted fact of want of motive was immaterial in passing on the guilt or innocence of the defendant. This assignment is a proposition itself. Bill of exceptions, record page 16 shows the truth of the facts stated in said assignment. Our contention is that while it is not error for the trial court to comment upon the testimony in a case on trial, give his views as to the weight of the evidence and may go so far as to comment on the credibility of witnesses; but when the court assumes the right to tell the jury that admitted facts establishing or tending to establish the truth of any issne joined, are immaterial, goes beyond the bounds that the law permits and commits error for which we submit any case ought to be reversed.

6th Assignment.

The court erred in using the following language

in his charge: "The jury does not assess the punishment in this court; they only find whether the defendant is guilty or not guilty, and a party convicted of murder is punishable by death unless the jury adds to their verdict without capital punishment, in which event the party is imprisoned for life. Error because not the law, but just the converse, the statutes of the United States make it the duty of the jury in every capital case to fix the punishment by their verdict. Said charge is inconsistent with itself and other parts of the court's charge, and well calculated to cause the jury to conclude that the court finally fixed the punishment after conviction."

7th. Assignment.

The court erred in using the following language in its charge: "If it is true that the defendant took the life of Vina Coleman as charged in the indictment, and at the time said act was committed the mental and physical faculties of said defendant were beyond his control, or if some controlling mental or physical disease was in truth the acting power within him which he could not resist, and he was impelled, without reason or purpose, he would not be accountable to the law. Error because the defendant had not plead impulsive insanity as a defense; defendant did not claim that at the time of said killing that he was controlled by such an uncontrollable impulse that he

could not control his physical actions. The only defense relied upon by defendant was delusive insanity—that laboring under such insane delusion he acted deliberately in taking the life of Vina Coleman under the delusive and insane belief that God had by direct command commanded him to kill the deceased. 2nd. Said charge does not instruct the jury the correct test of defendant's responsibility in the case under the evidence before them." Our contention is that the charge complained of in assignment 7th presented for the consideration of the jury a defense not relied upon by the plaintiff in error and calls their attention to a condition of the defendant mentally and physically not claimed by council for plaintiff in error. Said charge called the attention from the real issue and makes the right of the plaintiff in error to an acquittal depend upon whether or not defendant had control of his physical as well as his mental faculties at the time of the killing.

We contend that the plaintiff may as a matter of fact have had complete control of his physical faculties at the time of the homicide and may have acted with a character of deliberate purpose; yet if such deliberation and purpose was the result of a diseased mind then plaintiff in error would be entitled to an acquital. 8th. Assignment.

The court erred in using the following lang-

uage: "If you find from the evidence, beyond a reasonable doubt that the defendant killed Vina Coleman as charged in this indictment, and you further find that his brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience and judgment, and the defendant in committing the act acted from an irresist ible and uncontrollable impulse, or, if you have a reasonable doubt in regard thereto, then he would be guiltless and would be entitled to be acquitted." Error because the word brain is used instead of mind and makes the defendant's right to be acquitted depend upon an insane brain instead of a condition of the mind at the time of the killing. The jury, under said charge, acquit defendant unless they believed he acted under an irresistible and uncontrollable impulse in taking the life of Vina Coleman. 3rd, the charge does not submit the defense relied upon by the defend ant, viz, delusive insanity.

Assignment 8th is a clear, concise presentation of one of the questions involved. To-wit: Did the right of the plaintiff in error to an acquittal under his plea depend upon whether or not he acted from an irresistible and uncontrollable impulse in killing the deceased Vina Coleman. We insist that the charge is misleading and not the law of the case. If plaintiff in error was in fact insane at the time of the homicide, that

is, if his mental condition was such that he did not know right from wrong as applied to the act he was doing, then we submit as a legal proposition he was entitled to an acquittal. no matter what his physical condition may have been. And plaintiff in error may have acted deliberately in the killing, yet if he was in fact laboring under delusive insanity he had the right to a clear charge on that issue and an acquittal.

9th. Assignment.

The court erred in attempting to give the law in using the following language, viz.: "The real test, as I understand it, of liability or non-liability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased brain. and it was not partially diseased or to some extent, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were so impaired that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was not in this condition he can be punished by law " This charge is error, 1st, because it makes the defendant's responsibility to the law for the act of killing Vina Coleman depend solely upon whether or not his brain was impelled by an irresistible and un-

controllable impulse, when his responsibility depended solely upon the condition of his mind, and the question of irresistible impulse was not even raised by the proof offered. 2nd, said charge excluded the real defense, delusive insanity, and makes defendant's guilt depend on whether or not he was laboring under the influence of impulsive insanity at the time he killed the deceased. 3rd, said charge is inconsistent with the law; not applicable to the facts in evidence; places the burden on the defendant of showing that he did not have the mental capacity to form a criminal intent, but must show, in addition to want of capacity, that the disease had so taken charge of his brain and had impelled it. The jury should have been instructed to inquire as to the condition of the defendant's mind at the time of the killing—not his brain.

The charge complained of in this assignment tells the jury in effect that it is their duty to convict plaintiff in error, unless at the time he killed Vina Coleman he was acting under an irresistible and uncontrollable impulse see charge of the court record page 27. We submit that no real expert has ever yet determined as a matter of fact that the brain is the seat of the mind or that the mind is the product of the brain. Hence all that part of the charge about condition of the brain is error.

9th Assignment.

"The court erred in the following, viz: The government had introduced some evidence in regard to the defendant's drinking whisky about the time the homicide is said to have been committed, and contends that the defendant was not insane, but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land, and had stated to a witness, 'that he desired him to tell the truth in regard to the matter,' and from this evidence insists that Hotema was not insane, but was aware of the act he was committing, and also aware of the fact that it was wrong. Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piece-meal, but all evidence introduced in this case on both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. Error because no witness had testified to such declarations from the defendant. 2d, because it called the attention of the jury to criminating evidence, and instructed them to consider it against the defendant. 3d, said charge is erroneous because the government insists from this partic-

ular evidence that the defendant was not insane, but drinking, when in fact the prosecution had not offered such evidence for any purpose."

Statement from the record, bill of exceptions, page 18. "The defendant excepted to language as shown by assignment No. 9. Third, because it called the jury's attention to criminating evidence and instructed them to consider said evidence in determining whether or not defendant was insane, which evidence was never offered; no witness had used the language used, or substance of the language the court used in his charge."

Proposition under Assignment No. 9.

No court was ever vested with the right to call the attention of the jury to facts not in evidence. This proposition needs no authority to support its correctness; it is fundamental. The court in all cases demanding a charge to a jury must apply the law to the evidence offered on the trial; this may be done before or after the evidence is offered. We now, as an argument on this vital question, submit to the highest court in the nation, a record showing that the trial court approved a bill of exceptions which states the truth, in which it is shown that after the court had charged the jury, and before they retired to consider of their verdict, counsel for plaintiff excepted to the court's charge, because the court had called the attention of the jury to criminating

evidence, when in fact no such evidence had been offered, nor the substance thereof. An admission on the part of the trial judge that he did call the attention of the jury to evidence not offered, and instructed them to consider it against the plaintiff in error, using this language in regard to the evidence which was never before the jury: "And from this evidence insists that Hotema was not insane, but was aware of the act he was committing and also aware of the fact it was wrong." (See record, page 18). Thus telling the jury to consider evidence which was never offered, nor the substance thereof. Just here we desire to call attention to the attempt by the court to cure this patent error which he had committed by qualifying plaintiff's in error bill of exceptions as follows: (Record page 24).

5th As to the 9th paragraph of defendant's bill, Bond Coleman, a witness for the government, testified that immediately after had killed Vina Coleman, the defendant said to persons then present: "I now summon you all as witnesses." Riley Wilson, a government witness, testified that the defendant stated to him at Grant late that afternoon that he was going to Paris that night, a distance of about twenty miles, and then return and go to Antlers and surrender to the authorities, and the court at page 8 of its charge told the jury that they would be 'governed absolutely and entirely upon all questions of law by the charge

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I have given you, but upon the questions of fact and their application to principles I have given you in charge that is entirely within your own control."

We submit that this explanation does not correct the evil in the error committed. The evidence as recited by the court, as to witness Coleman, was in no sense that used by the court. Coleman's testimony, that the language used by the plaintiff in error was that of an insane mind. A man kill his friend and relative and then turn to those around and say, "I now summon you all as witnesses." It would have been going quite far enough if the trial court had called the jury's attention to the evidence upon which he seeks to justify his charge. But to admit he did call the attention of the jury to evidence not offered, and then when his attention was called to his error, refuse to correct it because other witnesses had testified to other facts going to show that plaintiff in error was not insane, is worse than a subterfuge, and error for which this case, in our humble opinion, *should* be reversed.

10th Assignment.

The court erred in its charge in using the following language: "There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe was being affected by witches, and that the deaths that oc-

curred in the neighborhood were due to the evil influence of the witches, and that the party that he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant, Hotema, believed in witches, and that it was the result of his investigation and belief as to what the scriptures taught, and that he, upon that belief, thinking he had the right to kill the party he is charged with killing because he thought she was a witch, but at the time he knew it was a violation of human laws and he would be punished; therefore, in that event, it would not be an insane delusion on the part of Hotema, but would be an erroneous conclusion, and being so would not excuse him from the consequences of his acts; and also, if you further believe he came to the conclusions from his investigation and understanding of the scriptures that this was a witch, and also used spirituous liquors, and these two combined were the cause or causes that lead him to the commission of the act, and that either or both these causes were, or these two combined were the cause or causes that lead him to the commission of the act, and that either or both these causes were the sole inducements that caused him to do the act, he would not be guiltless and would be responsible therefor." Error 1st. Because the evidence did not warrant such charge. The undisputed evidence shows that Hotema had for many years taught and preached against the

doctrines of witchcraft and had taught his people that there were no such things as witches. Said charge makes the defendant's right to an acquittal under his special plea depend upon what caused his insanity, if insane. Said charge states a condition of the defendant's mind that would, in fact show insane delusions, and then tells the jury that if they believe that such condition did in fact exist in the defendant's mind at the time of the killing, that such condition and acts would not be an insane delusion, but an erroneous conclusion. Said charge tells the jury that if the defendant's condition was the result of the use of intoxicating liquors, yet he would be amenable to the law and punishable for his acts. The charge fails to limit the effect to the recent use of intoxicating liquors. The charge fails to define delusive insanity, which should have been done, and leaves the jury to say whether the facts established the claim of the defendant that he was laboring under delusive insanity at the time of the killing.

Proposition under 10th Assignment.

Delusive insanity is a defense to homicide in all cases where the evidence shows that there is a reasonable doubt as to the condition of the person's mind at the time of the homicide. Where delusive insanity is plead as a defense, the test of responsibility is just as in any other character of insanity, viz: Did the prisoner at the time of the doing the

unlawful act know that he was doing wrong or committing a crime. Judge Cox, in the Guitteau case, used this terse and clear language in his charge to the jury: "But that the only safe rule for you is to direct your reflections to the one question which is the test of criminal resposibiiity, and which has been so often repeated to you, viz: Whether, whatever may have been the prisoner's singularities and eccentricities he possessed, the mental capacity at the time the act was committed, to know that it was wrong or was deprived of that capacity by mental disease." 10th Federal Reporter, page 183. In this clear test of criminal responsibility we see nothing of physical capacity or disease of the brain, nor irresponsible and uncontrolable impulse.

We submit that if criminal responsibility for crime depends upon what caused the prisoner to become insane, or deprived him of the mental capacity to determine right from wrong as applied to the act he is about to do. Then, indeed, we had better admonish our people to be careful what they read and how they investigate great questions lest they might become insane from causes that would not save an insane man from the gallows, although the trial court and jury were satisfied that the prisoner was insane when he committed the deed. The very thought that a man's responsibility for crime, if insane, depends upon the causes that produced his mental condition, when not traceable to his own wrongs

such as the recent use of intoxicating liquors is illogical and can not be maintained on correct principles of our advanced jurisprudence.

11th Assignment.

The court erred in using the following language in his charge. "Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by the teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and that at the time of the killing he performed the same solely on such belief, and he was not laboring under an insane delusion. If you believe this state of case existed, you will find the defendant guilty as in the indictment." Error, because it wholly fails to define insane delusions and distinguish between sane and insane delusions. Said charge states a case of undoubted insane delusions, and then tells the jury if they believe such case did exist in Hotema's case they could convict him. This charge deprives the jury of the right to determine from all the evidence before them whether the defendant was sane or insane at the time of the homicide.

This assignment will be considered with 12th assignment.

12th. The court erred in refusing the special charges asked by the defendant as follows: "If, from all the evidence before you in this case, you believe that the defendant, Solomon Hotema, at the time he shot and killed Vina

Coleman, was laboring under such mental condition he did not have sufficient mental capacity to, and did not know it was wrong to kill said Vina Coleman as he did kill her, and you further believe this condition of defendant's mind was not produced by the recent use of intoxicating liquors, then he is entitled to be acquitted."

2d. "If you believe from the evidence before you that at the time of the killing Vina Coleman by the defendant, defendant was in such mental condition that he honestly believed that God had, by direct command, commanded him to kill the said Vina, and that at the time he did the killing he believed he was doing God's will, then he is entitled to be acquitted upon his plea of delusive insanity. In this connection you are instructed that if defendant's mind was as above stated, and he honestly believed as stated, then it is immaterial what caused such mental condition, providing it was not the recent use of intoxicating liquors." These charges should have been given because the evidence offered demanded such instructions, and because the court's charge restricted the jury and required them to find upon a state of case which the law does not demand a conviction.

Proposition under 12th Assignment.

No person can commit the crime of murder when in such mental condition as not to have mental capacity to know it is wrong to kill another without any cause. Hence,

the first paragraph of the special instructions should have been given.

The court tried by explanation and qualification of plaintiff's in error bill of exceptions, to correct the error in refusing special charges asked by plaintiff in error, explanation as follows:

"As to the thirteenth paragraph of defendant's bill, the charge therein referred to is believed to have been fully covered by the general charge of the court. There was no evidence in this case to show that the defendant acted under a direct command of God, and the court, at page six of its charge, charged the jury upon the question of insane delusions, as well as upon page five thereof and elsewhere." (Record page 24).

Under this assignment we beg to call the attention of the court to matters *not printed* in record. The attorney general ordered or requested the district attorney to forward to the department of justice a copy of the evidence in the case. If I may be permitted to call attention to that record then I submit that it shows that defendant did believe that God had commanded him to kill Vina Coleman and others, and he so declared at the time of the killing and for months after his incarceration. Besides, there is much evidence in said record to show that plaintiff in error did believe that God had commanded him to kill Vina Coleman and others.

In fact, the defense was placed solely upon the idea that plaintiff in error believed that he owed the duty to God to kill Vina Coleman and others, and impressed with that belief he did kill three on the same day, at different times and places. We rely upon such assignment of error and pray for a reversal.

We have not referred to any authorities, because of the physical condition of the writer, who has not had access to authorities, having prepared this brief at his residence. In conclusion, we insist that many of the errors complained of are fundamental. Wherefore plaintiff in error prays a reversal.

Respectfully submitted,

JACOB C. HODGES,

Attorney for Plaintiff in Error.